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WASHINGTON, D.C. 20554

In the Matters of	**)**	
	)	
Connect America Fund	**)**	**WC Docket No. 10-90**
	)	
Establishing Just and Reasonable Rates For Local Exchange Carriers	**)** **)**	**WC Docket No. 07-135**
	)	
High-Cost Universal Service Support	**)**	**WC Docket No. 05-337**
	)	
Lifeline and Link-Up	**)**	**WC Docket No. 03-109**
Developing a Unified Intercarrier Compensation Regime	**)** **)**	**CC Docket No. 01-92**
	)	
Federal-State Joint Board on Compensation Regime	**)** **)**	**CC Docket No. 96-45**
	)	
A National Broadband Plan for Our Future	**)** **)**	**GN Docket No. 09-51**
	)	

COMMENTS OF CINCINNATI BELL INC. ON PROPOSED INTERCARRIER COMPENSATION REFORM PLANS

August 24, 2011

SUMMARY

Cincinnati Bell questions whether the Commission has the power to require intrastate access charge reductions. The ABC Plan has a fundamental flaw by assuming that the FCC can alter intrastate access rates. Instead of assuming the power to affect intrastate access rates directly, the Commission should consider other methods to incent state commissions to take action, as intrastate access reform is up to the state commissions to accomplish.

If the Commission decides to implement ICC reform, the reform should be limited to terminating access only. The Commission should limit its reforms to items that eliminate arbitrage opportunities, such as phantom traffic, traffic pumping and interconnected VoIP traffic. After these issues have been addressed, the Commission should reevaluate the situation. Only if arbitrage problems are still prevalent, should the Commission then consider proposals for a single rate for all carriers. A low uniform rate for all carriers is unnecessary. There is no evidence that the proposed uniform rate of $0.0007 is compensatory. Cincinnati Bell suggests individual per-carrier terminating rates utilizing TELRIC rates. Another alternative is the uniform per-company, per minute proposal found in the State Members Plan.

Cincinnati Bell has no issue with the use of benchmarks as floors for USF eligibility; however, the Commission should not impose a rate cap, which could prevent carriers from recovering access charges. The Commission should either eliminate the ABC Plan proposed $30 cap altogether or else make accommodations for mid-size price cap companies, which may have no alternative means of recovery other than SLC increases

Some mid-size companies like Cincinnati Bell do not benefit from the ABC plan as do large integrated carriers or rate of return carriers. Cincinnati Bell would lose a substantial

revenue source because of access charge reductions and be limited to recouping those losses by increasing its federal SLCs. To mitigate the impact of the plan on the mid-size carriers who are not protected under the ABC Plan, there should be a longer glide path, a higher intercarrier compensation rate and/or a higher overall rate cap.

Cincinnati Bell continues to question the legal authority of the Commission to impose intrastate access charge reform. Neither § 251(b)(5) or § 251(g) of the Communications Act give the Commission jurisdiction over access rates. Section 251(b)(5) addresses transport and termination, not access charges. The inseverability doctrine does not provide a basis for preemption of state authority over intrastate rates under § 201. If traffic is identifiable as intrastate, § 2(b) prohibits federal rate regulation.

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I. INTRODUCTION

Cincinnati Bell Inc. ("Cincinnati Bell") has previously offered comments in this docket on proposals for intercarrier compensation ("ICC") reform.[1] On August 3, 2011, the Commission released its Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, seeking comments on several ICC reform plans that have been submitted to the Commission, specifically, the proposal by the State Members of the Federal-State Universal Service Joint Board ("State Members Plan"), the "RLEC Plan", filed by the Joint Rural Associations, and the "America's Broadband Connectivity Plan" submitted by six price cap companies ("ABC Plan"). Cincinnati Bell offers additional comments primarily on the ABC Plan.

The ABC Plan would transition over a five year period to a system in which all terminating intercarrier traffic would be exchanged at the same low ICC rate of $0.0007 per minute. Over the first two years, the ABC Plan would require intrastate terminating rates to be reduced to interstate rate levels. During the next three years, all terminating ICC rates would transition to $0.0007 per minute. After the fifth year, no compensation would be allowed for tandem switching and transport for carriers that terminate calls. The ABC Plan would allow limited increases to federal SLCs to offset the ICC rate reductions with the constraint that the total of local service rates, per-line state high-cost fund contributions, and federal and state SLCs could not exceed $30 per month. The ABC Plan also includes a transitional access replacement mechanism ("ARM") for price cap ILECs that experience exceptionally large reductions in intercarrier compensation revenue.

[1] Reply Comments of Cincinnati Bell Inc., WC Docket No. 10-90 (filed May 23, 2011).

II. COMMENTS ON THE ABC PLAN

A. The Commission Should Leave It To State Commissions Whether and How to Reform Intrastate Access Charges

The ABC Plan proposes to reduce intrastate terminating access rates to the level of interstate access charge rates over a two year period and to provide price cap ILECs the opportunity to replace the lost revenue through increases to the federal SLC. The Commission seeks comment on how that proposal would affect states in different stages of access reform. §II.A, p. 10. The Commission also seeks comment on whether the ABC Plan could be improved by incenting states to do rate rebalancing or create state USFs.

As addressed in its comments on the Commission's legal authority, *infra*, Cincinnati Bell questions whether the Commission has the power to require intrastate access charge reductions. The ABC Plan has a fundamental flaw by assuming that the FCC can alter intrastate access rates.

Various states are in different stages of access reform, which must be done in accordance with individual state laws. Instead of assuming the power to affect intrastate access rates directly, the Commission should consider other methods to incent state commissions to take action, as intrastate access reform is up to the state commissions to accomplish. State commissions that require intrastate access charge reductions should afford the affected carriers a means of recovering that revenue from end users or a state USF. If the states do not do so, the Commission should permit a recovery mechanism. Certainly the Commission should do nothing to interfere with affected carriers' ability to adjust local rates or to implement state SLC or USFs to recover lost revenues as more states impose mirroring or other intrastate access charge reforms.

B. The Commission Should Limit Reform To Terminating Access Charges.

The Commission seeks comment on whether access reform should be limited to terminating access or if it should also address originating access charges. §II.C.5, p. 15. If so, the Commission posits whether a flat originating access charge should be implemented. Cincinnati Bell supports limiting access reform to termination charges. Even under the most liberal interpretation of § 251(b)(5) to include access service, that provision still does not address originating access charges. Section 251(b)(5) expressly applies only to "transport and termination" and does not include "origination" service. Thus, ICC reform must be limited to terminating access, if implemented, and not apply to originating access.

While the Commission does have authority over *interstate* originating access charges under § 201, no compelling case has been made for major overhaul of originating access charges. As noted by the Commission, a large number of customers obtain their interexchange service from an affiliate of their LEC. Reforming originating access charges would have no net effect on those carriers. And, unlike terminating access charges, which the interexchange carrier has no power to avoid, interexchange carriers can choose not to serve customers who are located in areas that have high originating access charges. Interexchange carriers thus control their exposure to originating access charges, where they cannot avoid terminating calls wherever their customers choose to call. Finally, originating access does not present the arbitrage opportunities that terminating access does. The LEC that originates the call creates the call detail record that defines which access charges apply. And, because it hands the call directly to the interexchange carrier, it cannot hide its identity.

C. The Commission Should First Eliminate Arbitrage Abuses Before Reducing Access Charges

At this time, the Commission should limit its reforms to items that eliminate arbitrage opportunities, such as phantom traffic, traffic pumping and interconnected VoIP traffic. After these issues have been addressed, the Commission should reevaluate the situation. Only if arbitrage problems are still prevalent, should the Commission then consider proposals for a single rate for all carriers.

There is no particular reason why all carriers should charge the same ICC rate in order to solve arbitrage problems. The primary arbitrage opportunity presented by the current system is the difference in rate based upon the jurisdictional nature of the call. Local reciprocal compensation rates tend to be the lowest, followed by interstate switched access rates, with intrastate switched access rates being the highest. Carriers seeking to pay the lowest rates are incented to make their traffic appear to be local traffic rather than access (such as VoIP carriers seeking to pay local rates to terminate access traffic) or interstate rather than intrastate access to avoid paying higher intrastate rates. These problems could be solved by prohibiting the misclassification of traffic.

Even the ABC Plan would not eliminate all arbitrage opportunities. For example, it proposes to classify VoIP traffic as either local or interstate access depending upon the call detail information. This does nothing to prevent the VoIP carrier from generating call detail records that make all VoIP calls look local, in order to avoid the higher access charges. The Commission should consider taking other steps to prevent that today, without overhauling the entire ICC system. Appropriate rules requiring VoIP carriers to pass on accurate call detail information could be implemented now.

D. A Low Uniform Rate for All Carriers is Neither Necessary Nor Appropriate

Because the main evil to be conquered by ICC reform is rate inequality – as opposed to the absolute rate levels – equalizing termination rates for different types of traffic is more important than lowering rates to artificially low levels. Moreover, artificially low rates would increase the demand on alternative recovery mechanisms.

The ABC Plan would transition all ICC rates to $0.0007 over a five year period. Setting the ICC rate artificially low will increase the burden on alternative recovery mechanisms and have other unintended effects. Carriers who are required to reduce their rates to this level would have some ability to recoup the lost revenue by increasing their federal SLCs. This might be a workable means of rebalancing rates so as to reduce intercarrier compensation expenses, except that the $30 (discussed *infra*) cap would limit terminating carriers' ability to fully recover their costs.

A uniform rate applicable to all traffic, regardless of whether it is intrastate or interstate, local or toll, would eliminate the incentive for carriers to engage in uneconomic arbitrage activities and remove the need for carriers to determine what type of traffic they are receiving. However, that result could be achieved just as easily by unifying each individual carrier's rates. There is no reason that a uniform rate must be the same for all carriers. Imposing the same rate for all carriers is unnecessary to eliminate jurisdictional identification and associated arbitrage issues and would be inequitable to many carriers whose costs are higher than the single uniform rate.

Section 252(d)(2) requires that reciprocal compensation rates be based on a reasonable approximation of the cost of terminating such calls. No one suggests that the proposed $0.0007 rate covers the cost of terminating calls on every LEC network. The $0.0007 unified rate proposed in the ABC Plan was the product of the Commission's ISP Remand Order and does not necessarily reflect any individual carrier's cost to terminate traffic. That rate was adopted from compromise agreements that a few LECs and CLECs negotiated to solve the crisis that arose from the billing of reciprocal compensation charges by carriers that served dial-up ISPs. As the State Members of the Federal State Joint Board on Universal Service have stated "there is NO record evidence – no empirical data – no actual cost studies – to support imposing a single industry-wide $0.0007 rate as compensatory."[2] Carriers delivering large amounts of traffic to ISPs voluntarily agreed to accept this low compensation rate in order to assure that they received something from delivering carriers. LECs agreed to accept the low rate for reciprocal compensation purposes in order to stem their losses caused by paying CLECs for traffic destined to ISPs. Use of the $0.0007 rate for local reciprocal compensation did not harm LECs, largely because local voice traffic tends to be fairly balanced – no matter what rate is charged, originating and terminating local carriers exchange relatively equal volumes of traffic so reciprocal compensation payments tend to balance out.

The same cannot be said about access charges. There is not a two-way flow of access payments, so any reduction in access rates has an immediate negative effect on only the LECs, whose rate structures were developed around the concept of recovering the cost of long distance usage of its local network via access charges. If the Commission forces LECs to reduce access rates, a recovery mechanism for the lost revenues is necessary. The ABC Plan proposes to do that primarily by increasing SLCs.

[2] *State Members of the Universal Service Joint Board, N*otice of Oral E*x Parte*, WC Docket No. 10-90 (filed July 14, 2011).

Carriers do incur costs to terminate access traffic and those costs are not necessarily the same for all carriers. If the Commission decides to move forward with a comprehensive ICC reform plan, an alternative to the $0.0007 rate would be for individual carrier rates to be set at their individual TELRIC. Numerous state commission proceedings have occurred over the last 15 years to establish carriers' forward looking costs of providing local termination services and those efforts should not go to waste. Under the theory that a minute is a minute, the cost of terminating access traffic should be at least as high as the cost to terminate local calls. This approach could be adopted relatively quickly since the state commissions are already familiar with the methodology and rates have already been established for many carriers. Using higher TELRIC rates would reduce pressure on retail rates, SLCs and alternative recovery mechanisms.

An alternative approach is proffered by the State Members Plan, the concept of a uniform per minute rate for each company. They recommend that each carrier establish a uniform ICC rate for all traffic as the lower of the carrier's own current per-minute interstate termination rate and its average ICC terminating rate, where the average ICC terminating rate is the sum of current terminating revenue divided by the sum of terminating minutes. This rate would be calculated one time and be fixed for at least five years. As the State Members say, this plan would eliminate arbitrage opportunities, improve economic efficiency by establishing a cost-based regime, and minimize demands on the USF.

E. The ABC Plan Would Undermine the Special Access Market and Create New Uncompensated Burdens on ILECs

The Commission should not overlook the impact that low ICC rates would have on special access services, a subject that is ignored by the ABC Plan. If rates for terminating access are set artificially low, carriers would have an incentive to shift all of their traffic from special access facilities to switched access service. Once the per minute rates decline below the cost of facilities, direct end office trunks will become uneconomical. The ABC Plan would further exacerbate this effect after five years, when it would eliminate any compensation for the use of tandem switches and transport of carriers terminating calls on their own networks. As a result, interexchange carriers would likely cancel all direct end office trunks and only deliver terminating traffic to tandem switches, which would be less costly for them than direct end office interconnection. Terminating carriers would have to increase capacity on their tandem switches to handle the increased traffic load and also would bear the cost of additional tandem switching and transport facilities, with no revenues from the carriers that deliver traffic over those facilities. The ABC Plan does not account for this future shift in behavior or provide a mechanism to compensate local carriers for the combined loss of special access revenue and increased expense necessary to handle increased traffic at tandem switches. This is potentially an enormous new cost to ILECs for which they would have no recourse.

F. The $30 Rate Cap In the ABC Plan Should Not Be Adopted

The ABC Plan proposes a $30 rate benchmark for price cap carriers, which would be a ceiling on consumer rate increases. The Commission questions whether the ceiling is sufficient to mitigate any potential impact on consumers in states that have already begun reforms by increasing local rates or implementing state USFs. The Commission also asks whether the benchmark should take into account the rates in effect on January 1, 2012 or higher rates at some later point before access recovery amounts are calculated.

While Cincinnati Bell has no issue with the use of benchmarks as floors for USF eligibility, the Commission should not impose a rate cap, which could prevent carriers from recovering access charge reductions by rebalancing rates. Because of the variety of situations that may occur (e.g., states that have already mirrored intrastate and interstate rates, states where only some carriers have rebalanced, states that have ongoing proceedings, states that have done nothing), the Commission should refrain from capping overall rates. Moreover, the rate cap, which is based on a combination of intrastate and interstate rate components, itself may implicate § 2(b) of the Communications Act, which prohibits Commission regulation of intrastate rates. In today's competitive market there is no need for a rate cap – ILEC's rates will be constrained by the presence of CLECs, wireless, cable and VoIP providers.

The proponents of the ABC Plan do not offer a compelling justification for imposing a rate cap at all or for selection of the $30 cap in particular. The ABC Plan has no provision to increase the cap over time. Accordingly, future local service rate increases should be governed by state law and not be subject to the cap, which should only take into account the rates in effect at the time the cap is initiated. If the Commission moves forward with the ABC Plan or a variation on it, it should either eliminate the $30 cap altogether or else make accommodations for mid-size price cap companies, which may have no alternative means of recovery other than SLC increases.

Although the ABC Plan proposes a temporary recovery mechanism for price cap carriers that would be limited by the $30 cap, the ARM is of limited duration and would be phased out after only three years. Because such recovery mechanism is expressly temporary, it does not suffice as a long term solution. The Commission should either make the ARM a permanent feature, or phase out the rate cap in coordination with elimination of the ARM. Otherwise, the ARM is not a "transition" because it does not lead from one regulatory regime to another. It merely defers the elimination of an existing source of revenue for ILECs without providing any replacement mechanism.

G. The Commission Should Soften the "Glide Path" for Mid-Size Price Cap Carriers.

The ABC Plan offers the most benefit to large integrated carriers, who would experience substantial reductions in terminating access expenses, and rate of return carriers (mainly small and rural LECs), who would be nearly guaranteed the same revenues as they earn today. Caught in the middle by the ABC Plan are mid-size price cap carriers like Cincinnati Bell who do not fit either of the above patterns. Unlike the large nationwide facilities-based interexchange carriers, Cincinnati Bell will not experience substantial cost savings from access charge reductions because the majority of its long distance traffic is handed off to other facilities-based carriers for completion. And, as a price cap carrier, Cincinnati Bell would not enjoy the revenue protections that the ABC Plan provides for rate of return carriers. Thus, Cincinnati Bell would lose a substantial revenue source because of access charge reductions and be limited to recouping those losses by increasing its federal SLCs. But, the opportunity to increase federal SLC is not a complete solution, because the annual SLC increase limits and the $30 overall cap could prevent Cincinnati Bell from raising its federal SLC by an amount sufficient to break even, assuming the competitive market would enable Cincinnati Bell to increase its end user rates.

To mitigate the impact of the plan on the mid-size carriers such as Cincinnati Bell, who are not protected under the ABC Plan, there should be a longer glide path, a higher intercarrier compensation rate and/or a higher overall rate cap. With respect to the glide path, as Cincinnati Bell stated in its May 23, 2011 comments, the first step, over three to five years, would be to equalize intrastate and interstate rates. Then, the Commission should reevaluate whether further action is necessary. Cincinnati Bell believes that rate equalization alone would solve most of the arbitrage problems of which carriers have complained (VoIP classification, phantom traffic and pumping issues). Any further lowering of ICC rates would only serve to put pressure on local service rates. If the Commission does force all ICC rates downward, it should not impose caps on local service rates (or any combination of local services rates and SLCs), as the market will determine when rates are too high. An artificial rate cap serves no purpose except to prevent LECs from recovering revenues lost through ICC reform. By eliminating or increasing the caps above the ABC Plan proposal, the Commission would eliminate or reduce the need for an ARM solution.

Because the Commission is not empowered to impose intrastate access reform, any federal access charge reform should wait several years, to give those states that do plan some voluntary access charge reform time in which to do it. Should the Commission move forward with the ABC Plan or some variation of it, Cincinnati Bell would recommend not starting the reforms in July 2012, which is too soon for the complex plan being proposed at this time. Carriers must have time to incorporate changes to their billing systems, to do financial planning and make budget changes and to provide investor guidance.

III. LEGAL AUTHORITY

Cincinnati Bell continues to question the legal authority of the Commission to impose intrastate access charge reform. A lynchpin of the ABC Plan is the assumption that the Commission can mandate intrastate access charge reductions. Cincinnati Bell has previously addressed limitations on the Commission's authority to require intrastate access charge reductions. The ABC Plan does not eliminate the basic question of whether the Commission has the authority to regulate intrastate access rates.

The ABC Plan advocates claim parallel sources of authority for the Commission to reform intrastate access charges, § 251(b)(5) [3] and § 201[4] of the Communications Act. As Cincinnati Bell has explained before, the Commission does not have authority to set intrastate access rates under § 251(b)(5). Section 251(b)(5) addresses transport and termination, not intrastate access charges. The ABC Plan advocates also rely on the inseverability doctrine to assert authority to preempt state regulation of ICC under § 201. While jurisdictional identification of some categories of traffic may be becoming more difficult as technology and consumer habits change, the majority of access traffic still can be related to a specific jurisdiction. Accordingly, the inseverability argument is not supported for the majority of the traffic terminated on the PSTN. Even if there are some categories of traffic that cannot be identified, where traffic can be identified as intrastate, the Commission is strictly prohibited from regulating that traffic by the jurisdictional bar of § 2(b).[5]

A. Section 251(b)(5) Does Not Give The Commission Jurisdiction Over Intrastate Access Rates

The ABC Plan advocates interpret § 251(b)(5) as granting the Commission authority over intrastate access charges. Section 251(b)(5) requires all local exchange companies to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." While "telecommunications" could be interpreted broadly to include both local exchange traffic and exchange access traffic, § 251(b)(5) contains two express limitations that have largely been ignored—it only applies to "reciprocal compensation" and only with respect to "transport and termination"—which together preclude it from applying to exchange access. The meaning of

[3] 47 U.S.C. § 251(b)(5).

[4] 47 U.S.C. § 201.

[5] 47 U.S.C. § 152(b).

§ 251(b)(5) is informed by § 252(d)(2), which states that, for the purpose of compliance with § 251(b)(5), the terms and conditions for reciprocal compensation are not just and reasonable unless they: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." "Reciprocal compensation" means that each party compensates the other for transport and termination, but exchange access charges have never been reciprocal. Access charges have always flowed in only one direction, from interexchange carriers to local exchange carriers who terminate calls.

In the First Report and Order, the Commission rightly concluded that transport and termination was a different service than exchange access.[6] The Commission concluded that § 251(b)(5) reciprocal compensation obligations applied only to traffic that originated and terminated within a local area.[7] Reciprocal compensation under § 251(b)(5) does not apply to either *interstate or intrastate* interexchange traffic because such traffic neither originates nor terminates on a long distance carrier's network.

The ABC Plan's new broad reading of § 251(b)(5), based on the definition of "telecommunications," does not support regulation of the termination of intrastate access traffic.[8] When two LECs interconnect directly, it would be permissible to apply § 251(b)(5) reciprocal

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[6] First Report and Order, ¶ 1033.

[7] First Report and Order, ¶ 1034.

[8] There is also a question whether § 251(b)(5) may be used to regulate compensation for VoIP traffic unless the Commission reaches the conclusion that such traffic is "telecommunications" and not an "information service."

compensation rules because both carriers originate *and* terminate calls. However, if there is an intermediary carrier that does not originate or terminate calls, its relationship with the local carrier is not "reciprocal." The ABC Plan ignores these limitations imposed by the terms "reciprocal" and "termination." The proposed new interpretation of § 251(b)(5) to supplant access charges with reciprocal compensation is contrary to the express language of §§ 251(b)(5) and 252(d)(2) and, thus, outside of the Commission's power of statutory interpretation.[9]

B. Section 251(g) Does Not Provide A Basis For Intrastate Jurisdiction

The ABC Plan advocates further rely on § 251(g) as a basis to regulate intrastate access charges. The essential purpose of § 251(g) was to preserve the enforceability of the terms of the AT&T and GTE Consent Decrees after the enactment of the 1996 Act because § 601 of the statute vacated those consent decrees.[10] It also grandfathered existing substantive requirements, including access regulations, until the Commission otherwise altered them. But § 251(g) is not itself an independent grant of authority to make such alterations, especially with respect to intrastate traffic. Such authority must be found elsewhere. The Commission's plenary powers over interstate access under § 201 do not extend to intrastate access because of § 2(b)[11] which directly prohibits regulation of intrastate services without express statutory authorization.[12] Previous attempts to rely upon § 251(g) as a grant of substantive authority have been rejected by the courts.[13] The conclusion of the D.C. Circuit Court in *WorldCom* is equally appropriate here:

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[9] *Chevron, U.S.A., Inc. v. NDRC, Inc.*, 467 U.S. 837 (1984).

[10] H.R. Rep. 104-458, at 122-23 (1996), U.S.Code Cong. & Admin.News 1996, 10, 134.

[11] 47 U.S.C. § 152(b).

[12] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 446-48 (5th Cir. 1999).

[13] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

"[N]othing in § 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations."[14] For the same reasons, just because § 251(g) encompasses existing access charge rules does not mean it grants the Commission jurisdiction to change them.

C. The ABC Plan Proponents Have Not Demonstrated That Traffic Is Inseverable.

The ABC Plan proponents also contend that § 201 empowers the Commission to regulate intrastate access because it is impossible to distinguish interstate and intrastate traffic. The so-called inseverability doctrine would allow the Commission to regulate intrastate matters when the subject matter of the regulation is impossible to separate into jurisdictional components. This doctrine has most often been applied where the Commission's regulation of jointly used property (e.g., customer premises equipment) applies to the equipment as a whole and cannot be isolated to just the interstate aspects of the property. However, in the case of traffic that can be separated jurisdictionally, the doctrine cannot be applied.

While there may be some nomadic VoIP traffic the origin of which cannot be readily determined, PSTN traffic is jurisdictionally identifiable, as it always has been. The ABC Plan proponents contend that the Commission may assert authority over intrastate access traffic because it is impossible to distinguish it from interstate traffic. But, as the Commission suggests by its questions in the Public Notice, the proposed treatment of VoIP traffic in the ABC Plan presupposes the ability to identify it separately. If VoIP traffic can be identified, that betrays the notion that it is inseverable from intrastate traffic. VoIP traffic cannot simultaneously be

[14] 288 F.3d at 433.

identifiable and inseverable. If the Commission appropriately determines that VoIP traffic is jurisdictionally interstate, then the Commission should simply treat VoIP traffic as interstate for ICC purposes – but this does not justify treating the remaining traditional intrastate wireline traffic as indistinguishable.[15] And, if VoIP call detail information can be used to separate local and non-local traffic, it can also be used to separate non-local traffic into intrastate and interstate traffic.

The ABC Plan advocates also argue in favor of inseverability of wireless traffic due to its nomadic nature. But, this argument likewise ignores the Commission's current treatment of wireless traffic. Wireless traffic can be identified as local, intrastate or interstate, regardless of the geographic location of the telephone number assigned to the handset, based upon the tower location where the call originates. Carriers often use that information to determine the jurisdiction of the call. Under the interconnection rules, wireless calls that originate in the same MTA as the called party are treated as local calls, whereas calls from outside the MTA may be charged access. The jurisdictional nature of wireless calls is therefore determinable and is not justification to just declare all traffic the same.

D. The Inseverability Doctrine Does Not Provide A Basis For Preemption of State Authority Over Intrastate Access Service.

The proponents of the ABC Plan attempt to evade the jurisdictional bar of § 2(b) by contending that it is impossible to regulate the interstate aspects of intercarrier compensation without affecting the intrastate jurisdiction. This argument is entirely unpersuasive.

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[15] Treating all access traffic as interstate under the inseverability doctrine has consequences for other programs as well. The federal USF is funded based on interstate revenues, so if all interexchange traffic is inseverable jurisdictionally, the federal USF rate base would increase vastly under the ABC Plan, while the intrastate base states may use for USF funding would disappear.

Because traffic is identifiable as interstate or intrastate, there is no basis for finding it inseverable. The ABC Plan proponents' backup contention, that the Commission may preempt state authority over intrastate access charges because it interferes with a valid federal policy, is a circular and fallacious argument. The Commission may only preempt inconsistent state regulation when the state regulation "negates a valid federal policy."[16] In the instant situation, the ABC Plan proponents contend that the valid federal policy is to have a uniform ICC rate. But that argument presupposes that a uniform ICC rate is a *valid* federal policy. By definition it is not – a uniform ICC rate would dictate that rates for intrastate traffic be the same as rates for interstate traffic. Yet, that very issue is addressed head on by § 2(b): "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication service . . . ." The Commission may not override this direct statutory prohibition merely by declaring it federal policy to have uniform intrastate and interstate rates. That policy declaration itself is prohibited by § 2(b) in the first instance.[17] In *Louisiana PSC*, the Supreme Court rejected a preemption order that barred states from requiring carriers to employ a different depreciation schedule for intrastate regulation than the one the FCC required for interstate regulation. *Louisiana PSC* stands for the proposition that the Commission may not preempt state regulation solely because it conflicts with the Commission's ideas of sound federal economic or regulatory policy. Thus, in order to affect

[16] *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989),

[17] The *NARUC* court vacated a similar attempt at preemption by the Commission due to circularity. The Commission had attempted to prohibit state authority over inside wire because costs were not severable into interstate and intrastate components, which would only be so because the Commission had declared inside wire no longer subject to separations. But that presupposed that the Commission could declare jointly used property not subject to separations. It could not do so in the face of the separations statute, 47 U.S.C. § 410(c), just as the Commission may not validly declare a federal policy of having uniform interstate and intrastate rates in the face of § 2(b).

intrastate access rates, the Commission will need to devise means to incent state commissions to enact intrastate access reform.

IV. CONCLUSION

In the near term, intercarrier compensation reform should be limited to measures designed to close the existing phantom traffic and traffic pumping loopholes. In the longer term reform effort, assuming it can overcome the jurisdictional barriers, the Commission should consider setting a single rate for each carrier, not a uniform rate for all carriers. Finally, if the Commission goes ahead with more drastic ICC reforms, these reforms should be limited to terminating access rates and the access recovery mechanisms should be adjusted so as not to impede individual carriers' efforts to recover revenues lost from access charge reductions. That includes modification or elimination of the $30 cap and/or the ARM so as not to limit carriers' ability to recoup revenues lost from access charge reductions. Moreover, it is important that any plan that reduces ICC rates be implemented gradually and provide opportunities for reevaluation at key steps in the transition.

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